SUPREME COURT, U.S.
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ALEXANDER L. STEVAS

No. 83-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OHIO,

Petitioner,

v.

KENNETH M. JOHNSON

On Writ of Certiorari To The Ohio Supreme Court

BRIEF OF RESPONDENT

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IN THE

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OCTOBER TERM, 1983

No. 83-904

STATE OF OHIO,

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On Writ of Certiorari To The Ohio Supreme Court

BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

The judgment of the Ohio Supreme Court rests on independent and adequate state grounds which precludes review in this Court and requires dismissal of the writ.

In the event jurisdiction is found to be properly lodged here, the Double Jeopardy Clause of the Fifth Amendment (made applicable to the states by the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U.S. 784) prohibits a further prosecution of the respondent as he has previously been convicted of the same offense.

A.

The Ohio Supreme Court has long adhered to the syllabus rule whereby only the syllabus (a short statement of a point of law) is the law of the case and is the only portion of the decision necessarily commanding the support of a majority of the Court. *State ex rel. Donahey* v. *Edmondson*, 89 Ohio St. 93.

The two syllabi in the case under review fully satisfy the guidelines of *Michigan* v. *Long*, ___ U.S. ___, 77 L.Ed. 2d 1201, by specifically identifying the state grounds that form the basis of the decision. While the first syllabus, regarding the robbery case, is as specific as possible, the second syllabus is uncertain enough to require reference to the opinion.

An examination of the opinion below with regard to the murder-manslaughter charges demonstrates that the judgment is based on the same state grounds that the Ohio Supreme Court explicitly assigned to the first syllabus. References in the opinion to federal constitutional law are in fact extraneous and neither necessary to the decision nor its basis.

Erroneous conclusions of federal constitutional law that appear in the opinion cannot alter the fact that the Ohio court concluded that murder and manslaughter bear the same relationship to one another that aggravated robbery and theft have to each other.

Even correcting the mis-statements of federal law that may be found to exist in the opinion below will not prevent the Ohio Supreme Court from adhering to its former judgment on remand on the basis of the same statute (R.C. § 2941.25) that respondent alleges is the 'adequate and independent' ground relied on originally.

This Court must reject a mechanical, rigid application of *Michigan* v. *Long*, *supra*, that would undermine the independence of state courts.

B.

Kenneth Johnson has been convicted, on his own plea, of killing one Thomas Hill and of stealing his property. The prison sentence on that judgment is presently being carried out and the conviction has long since been final.

The Double Jeopardy Clause protects a person against a second prosecution for the same offense following conviction. *North Carolina* v. *Pearce*, 395 U.S. 711. Without doubt the

respondent is entitled to the full protection of that guarantee since the proposed trial will implicate the "same offense" and will be a second proceeding.

Brown v. *Ohio*, 432 U.S. 161, establishes a constitutional rule that lesser included offenses are the "same offense" for double jeopardy purposes. Ohio has determined on the basis of this case and *State* v. *Wilkins*, 64 Ohio St. 2d 382, that manslaughter, as charged here, is a lesser included offense of murder and, hence, has answered the question of whether they are the "same offense." To force respondent to trial now on murder after he has been convicted of the "same offense" would violate the Fifth Amendment.

The collateral estoppel ingredient of the Double Jeopardy Clause prohibits an attempt by the state to relitigate an "ultimate" fact that was determined by the earlier conviction, to wit: causing the death of Thomas Hill. *Ashe* v. *Swenson*, 397 U.S. 436, *Illinois* v. *Vitale*, 447 U.S. 410.

Despite the fact that these charges all appeared in one indictment, Kenneth Johnson has not taken any action to mandate two *trials*. His fully authorized plea of guilty obviated the necessity of any trial.

The "termination" of the controversy here was based on a determination of guilt and is not analogous in any way to various forms of terminations that come at the behest of the defendant that are unrelated to guilt or innocence. *United States* v. *Scott*, 437 U.S. 82.

Nor did the respondent's plea of guilty put him in the position of one who had asked for two trials. *Jeffers* v. *United States*, 432 U.S. 137. His plea only put him in the position of demanding that he not be subject to a second prosecution after conviction for the same offense.

The State has no independently cognizable "right" to a trial and, inasmuch as it was the organ responsible for the charges being brought as they were, it is not in a good position to complain.

ARGUMENT

I. The Judgment Below Rests On An Independent And Adequate State Ground And This Court Is Without Jurisdiction To Review It

In reviewing judgments from state courts the role of this Court is limited to correcting improper or erroneous interpretations of federal law including federal constitutional law. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-6. It has been a settled principle, however, that if a state court judgment was both "independent" of any federal consideration and "adequate" under the state's own law to support the conclusion reached by the state court, this Court would not have jurisdiction for further review because any decision on such facts would be advisory only. *Herb* v. *Pitcairn*, *supra*.

In *Michigan* v. *Long*, ___ U.S. ___, 77 L.Ed. 2d 1201, this Court undertook to establish some guidelines and presumptions to make more consistent the ascertainment of whether a particular state court decision rested on federal or state grounds. The initial inquiry is to see if ". . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . ." *Michigan* v. *Long*, *supra*, 77 L.Ed. 2d at 1214.

A second part of the *Long* test, and one which requires a separate analysis, is ". . . when the adequacy and independence of any possible state law ground is not clear from the face of the opinion . . ." *Long*, *supra*, it will be presumed to be based on federal law.

Under this doctrine this Court will assume that any case that appears to rest on federal law or has a mixed foundation of state and federal law was, in fact, decided as it was because the state court believed that federal law required it to do so.

On the other hand, *Michigan* v. *Long*, *supra*, makes it clear that if a state court makes a plain, express statement in either its judgment or opinion that state law, rather than federal law, requires the result, this Court ". . . will not undertake to review the decision." *Long*, *supra*, at 1214.

A. The Ohio Supreme Court has made a "plain statement" that at least part of its judgment is based on Ohio law only

This Court has had considerable experience with the rather unique "syllabus rule" of the Ohio Supreme Court. Cf. *Beck* v. *Ohio*, 379 U.S. 89, 93 n.2, *Zacchini* v. *Scripps-Howard*, 433 U.S. 562, 565, *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 441-443 n.3. Under this practice, the syllabus defines and describes the points of law decided in any case;[1] it is the law of the case, *State ex rel. Donahey* v. *Edmondson*, 89 Ohio St. 93.

This Court has acknowledged the limitations placed on any Ohio Supreme Court opinion by the syllabus rule. In *Zacchini* v. *Scripps-Howard*, 433 U.S. 562, the court observed that it was the syllabus that required primary analysis: "The opinion syllabus, to which we are to look for the *rule of law used to decide the case*, . . ." (Emphasis added.)

Having stated the proposition, this Court found in *Zacchini*, *supra*, just as it had in *Perkins* v. *Benguet Consolidated Mining*, *supra*, that the basis for the court's judgment was not expressed in the syllabus, and, without more, it could not tell if it was based on federal law, state law influenced by federal law, or only on state law. Because of that *uncertainty*, this Court, relying on *Perkins*, *supra*, examined the opinion of the Ohio Supreme Court which made clear the federal grounds of the syllabus.

In this case, with regard to the respondent's conviction of theft and the subsequent dismissal of the aggravated robbery charge, there is no uncertainty in the syllabus. The Ohio Su-

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[1] "It has long been the rule of this court that the syllabus contains the law of the case. It is the only part of the opinion requiring the approval of all members concurring in the judgment. Where the judge writing an opinion discusses matters or gives expression to his views on questions not contained in the syllabus, it is merely the personal opinion of that judge." *Donahey*, *supra*, at 107,8.

preme Court clearly upheld the dismissal of the aggravated robbery on the basis of the Ohio multiple count statute:

> Aggravated Robbery, as defined by R.C. § 2911.01, is an "allied offense of similar import" to theft, as defined by R.C. § 2913.02 (R.C. § 2941.25[A], applied.)

State v. *Johnson*, 6 Ohio St. 3d 420, Syllabus One.

The multiple count statute, R.C. § 2941.25[A], (Brief of Petitioner, pp. A-5, 6) provides that if the "same conduct by a defendant can be construed to constitute two or more allied offenses of similar import," the defendant can be *indicted* for all of them but can be *convicted* of only one. The statute makes no reference to the manner of the conviction (i.e. trial or plea) and it does not make any reference to the sequence (i.e. which of two or more allied offenses produced the first conviction).

The Ohio Supreme Court has held in this case and in *State* v. *Logan*, 60 Ohio St. 2d 126, that the two offenses in question must correspond to such a degree that the commission of one will automatically "result in the commission of the other." *State* v. *Johnson*, *supra*.

Under Ohio law then, the unlawful taking of property will constitute theft; the unlawful taking of property while armed with a weapon will constitute aggravated robbery.[2] Where the same property and the same event are implicated, it is plain that a person cannot commit an aggravated robbery without simultaneously committing theft. *State* v. *Logan*, *supra*, and *State* v. *Harris*, 58 Ohio St. 2d 257.

The syllabus rule indicates that the court, as distinguished from the opinion writer, found that two of the counts in respondent's indictment were "allied offenses of similar import."

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[2] R.C. § 2913.02 provides: "No person, with purpose to deprive the owner of property . . . shall knowingly obtain or exert control over [it]"

R.C. § 2911.01 provides: "No person, . . . in committing a theft offense . . . shall do either of the following: (1) Have a deadly weapon . . . on or about his person. . . ."

Since that language appears in the Ohio statute and since the Ohio court exlicitly said in the syllabus that it was 'applying' that statute, its affirmation of the judgment below is obviously based on Ohio law only.

It took no new theory for the Ohio court to reach this conclusion. In *State* v. *Harris*, *supra*, the Ohio Supreme Court had held that the underlying theft was an "allied offense of similar import" to unarmed robbery. Where the same theft is transformed into aggravated robbery by the presence of a gun, it is clearly an 'allied offense of similar import' to the aggravated robbery.

This case is likewise free from the troubling questions that may arise when a state court appears to be relying on one of its earlier precedents but that precedent itself was influenced by federal law. Here the Ohio Supreme Court interpreted and relied on a state statute and specifically said so.

B. The first syllabus of the Supreme Court of Ohio's decision is independent of federal law and adequate to support the judgment

Ohio has provided more protection for defendants charged with multiple counts of the "same offense" than is required by the Double Jeopardy Clause. By enacting the multiple count statute the legislature intended to avoid arcane questions of double jeopardy law and reduce the potential for oppressive prosecutions.

The Legislative Service Commission comment to R.C. § 2941.25 makes the legislative intent clear: "The basic thrust of the section is to prevent 'shotgun' convictions." (comment to House Bill 511, 134 vH511, 1974.)

The Double Jeopardy Clause is not violated by charging a person with greater and lesser offenses in an indictment and it is not violated by convictions on all of them in a single trial. *Brown* v. *Ohio*, 432 U.S. 161, 166.

At that point, the Double Jeopardy Clause only requires that the court not impose multiple punishments for the same offense. Since a greater and lesser are the "same offense" under *Brown*, a trial court cannot impose a sentence for the lesser offense to be run after the sentence for the greater.

A further exception to the protection offered by the multiple punishment prong of the Double Jeopardy Clause exists in that the legislature may specifically authorize cumulative punishment for the "same offense" where the convictions are had at one trial. *Missouri* v. *Hunter*, ___ U.S. ___, 74 L.Ed. 2d 535 at 543.

Therefore, the protections afforded by the Double Jeopardy Clause do not prohibit more than one 'conviction' for the same offense in the same proceeding and in cases where the legislature has authorized cumulative punishments, they are likewise not constitutionally improper.

Ohio has specifically opted for a more restrictive approach to the issue of multiple crimes. There are three distinct differences between the Ohio statute (R.C. § 2941.25) and anything this Court has ever held that the Double Jeopardy Clause requires.

First, the test of "allied offenses of similar import" is much broader and more inclusive than tests so far for the "same offense." In *State* v. *Logan*, 60 Ohio St. 2d 126, the Supreme Court considered R.C. § 2941.25 and held that:

> Where an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, *a priori*, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime.

Logan, *supra*, 397 N.E. 2d 1345 at 1349. Thus, when Mr. Logan accosted a female and forced her down an alley for the purpose of committing rape, he was charged *inter alia*, with kidnapping and rape. He was convicted of both counts and sentenced consecutively.

Applying R.C. § 2941.25, the Ohio Supreme Court found that the single animus possessed for the perpetration of forcible rape necessarily included the ingredients of kidnapping where the movement of the victim was no further and no longer than was present in that case. The kidnapping conviction was reversed.

No definition of the 'same offense' in the Fifth Amendment, be it *Blockburger* v. *United States*, 284 U.S. 299, or any other would encompass the kidnapping and rape described in *Logan*, *supra*.

Therefore, Ohio has specifically expanded the protections that would naturally flow to all persons in Ohio under the Double Jeopardy Clause.

Secondly, R.C. § 2941.25 is not limited in timing to either one indictment, one proceeding, or successive prosecutions. The statute, to be sure, uses the term "the" indictment, but it cannot be read so literally.

If Mr. Logan had been charged in a second indictment with kidnapping, there is no doubt that he would have still been entitled to the protection of the statute if he had previously been convicted of the rape. Nothing in the opinion of the Ohio Supreme Court suggests the contrary. Had the facts been the same as described, it was his "conduct" that activated the protection and there is no limitation in the statute that would have prevented him from asserting it in a proposed second trial after his rape conviction.[3]

This protection is significantly different from that offered by the Fifth Amendment. *Brown*, specifically forbids successive prosecutions for the "same offense," but the Ohio statutes in the *Logan* case are clearly not the same offense and successive prosecutions are not barred for different offenses.[4]

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[3] Indeed without this interpretation, prosecutors could simply nullify the holding of *State* v. *Logan*, *supra*, by never indicting these offenses together or trying them together.

[4] Even if this Court adopts the collateral estoppel portion of the Double Jeopardy Clause, a question left unanswered by *Brown*, at 166, n.6, Logan

The third difference between the Ohio statute and the federal Constitution is that the statute prohibits *convictions* themselves and is not limited to prohibiting consecutive sentences.

If the Ohio statute had merely prohibited cumulative punishment for allied offenses, it would have simply been taking the opposite tack of that taken by the Missouri legislature. Cf. *Missouri* v. *Hunter*, *supra*. But far from choosing to not authorize cumulative sentencing, Ohio has specifically chosen to not allow more than one *conviction*.

Brown, *supra*, *Whalen* v. *United States*, 445 U.S. 684, and others make it plain that the Double Jeopardy Clause does prohibit multiple convictions.

The difference is enormous because it is the conviction that gives the power to the state initially to impose sanctions and an error capable of correction on appeal might apply to only one conviction and its reversal would leave the other conviction in tact. In the *Logan* case, for example, if the rape conviction were found to have been based on insufficient evidence and reversed outright, the kidnapping, but for R.C. § 2941.25, would still stand.

Because of the preceding, it cannot be doubted that the Ohio resolution of Mr. Johnson's challenge to a future aggravated robbery prosecution is based on an "independent" state ground. The multiple counts statute has a basis far different from either the constitutional or common law foundations of the Double Jeopardy Clause.

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could not have won since the kidnapping was probably not an "ultimate" fact encompassed by the rape. On the other hand, if the Court applies the logic of *In Re Nielsen*, 131 U.S. 176, also reserved in *Brown*, Logan might have prevailed if the kidnapping were viewed as one of the "parts" of the criminal goal. But for these purposes, since that position has not been taken by this Court to date, Ohio could not be said in any way to have interpreted its own law ". . . because it felt under compulsion of federal law as enunciated by this Court so to hold, . . ." *Zacchini*, *supra*, at 568, quoting *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U.S. 1, 5.

The test for 'independent' found in *Michigan* v. *Long*, *supra*, requires that it be "apparent from the four corners of the opinion," *Id.*, 1214, that the case is decided on state law. If the word "opinion" is treated as "syllabus," at least as far as Ohio is concerned, the state law ground and, hence, its independence, is apparent in this case. Even examining the opinion by Justice James Celebrezze, as it relates to this issue, leaves no doubt that the statute is the basis for decision. The respondent suggests, however, that with regard to syllabus one, this Court is confined to the syllabus since its meaning is not doubtful.

The decision below is also "adequate" on this point because it accomplishes its end without more. Where the state proposes prosecution of a person for what the Supreme Court of the state had held is "an allied offense of similar import" within the meaning of R.C. § 2941.25 to an offense that the same person has already been convicted of, it is clear that the proposed prosecution is impermissible. That is the holding below.

Since no additional questions need to be answered with regard to the status of the robbery-theft portion of this indictment in light of the syllabus to *Johnson*, *supra*, it is adequate to answer the question.

This Court's settled jurisprudence both before and after *Michigan* v. *Long*, *supra*, is well stated in *Zacchini:*

> If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, *Wilson* v. *Loew's Inc.*, 355 U.S. 597 . . . .

Id., at 566. *Long* did not change that rule.

C. The second syllabus below is an explication of Ohio law regarding the relationship between murder and manslaughter

Without doubt, the second syllabus of the *Johnson* opinion can be read as raising doubts concerning its meaning and its foundation. Because of those doubts *Perkins* v. *Benguet Con-*

solidated Mining Co., supra, probably requires this Court to examine the signed opinion.

The syllabus rule, together with the *Perkins* and *Zacchini, supra*, determination to look at the opinion, comprise a two-part test to ascertain if the presumption adopted in *Michigan* v. *Long, supra*, comes into play.[5]

The *Long* test, as discussed here, is that this Court will assume, in the absence of direct evidence to the contrary in the opinion, that "the state court decided the case the way it did because it believed that federal law required it do so." *Michigan* v. *Long, supra*, 77 L.Ed. 2d at 1214.

In first examining the second syllabus it is apparent that two notions are expressed. First, the Court below declares:

> The offenses of murder, R.C. § 2903.02, and involuntary manslaughter, R.C. § 2903.04, share the common element of causing the death of another and are distinguishable only by the offender's mental state.

Johnson, supra, syllabus two (first sentence). The import of this part of the syllabus is its establishing the relationship between two Ohio homicide statutes.

Murder is defined by Ohio law as the purposeful killing of another. ("No person shall purposely cause the death of another." R.C. § 2903.02, Pet. for Cert., p. A-26). Involuntary manslaughter is defined as causing the death of another as a proximate result of the offender's committing a misdemeanor. ("No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor." R.C. § 2903.04(B), Pet. for Cert., p. A-26).

The Court below held in the first sentence of the syllabus that these two crimes are very closely related and, as a matter of state statutory interpretation, are distinguishable *only* by the mental state of the offender. Not only is interpreting state

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[5] *Long* was decided just less than two months before *Johnson*, i.e. July 6, 1983 and August 31, 1983.

statutes the proper role for a state court, under *Garner* v. *Louisiana*, 368 U.S. 157, 169, (cited with approval in *Brown* v. *Ohio*, *supra*, at 167), the Ohio courts "have the final authority to interpret . . . that state's legislation."

That "final authority" draws these two offenses much more closely together than urged by the petitioner (Brief of Petitioner, pp. 33-38), but more importantly does not create the uncertainty necessary to go beyond the syllabus. *Perkins* v. *Benguet Consolidated Mining Co.*, *supra*.

> The second sentence of syllabus two provides:
>
> The prohibition against double jeopardy requires that in any one killing, the offender may be convicted of one or the other of the offenses but not both.

It cannot be seriously argued, and the respondent does not do so, that this sentence does not implicate the presumption of *Michigan* v. *Long*, *supra*. At the same time it is ambiguous enough to require reference to the signed opinion accompanying the syllabi. *Zacchini*, *supra*.

In the opinion there is much discussion and reference to the Fifth Amendment and cases of this Court. At the same time, there is discussion of Ohio statute law (R.C. § 2941.25) and Ohio cases. However, this decision is far different from *Zacchini* v. *Scripps-Howard*, *supra*, where the Ohio court identified a media privilege from suit in a syllabus that made no direct reference (or even indirect) to state law and this Court, in examining the signed opinion, clearly identified the foundation of the Ohio court's syllabus to be its understanding of the federal Constitution.

The opinion below restates the protections of *North Carolina* v. *Pearce*, 395 U.S. 711, but in the context of the opinion it appears to be as much historical as anything else being followed by a summary of the State's argument.

The Ohio court also quotes *Blockburger* v. *United States*, 284 U.S. 299, but that is not evidence of its reliance on federal constitutional law since the *Blockburger* rule is not a con-

stitutional requirement but a rule of federal statutory construction. *Albernaz* v. *United States*, 450 U.S. 333; *Missouri* v. *Hunter*, *supra*, (dissenting opinion of Justice Marshall, 74 L.Ed. 2d 535 at 547.) As the dissent below points out, the Ohio Supreme Court had just recently concluded that *Blockburger* had limited utility in Ohio and was not to be understood to serve any function beyond divining legislative intent. *State* v. *Moss*, 69 Ohio St. 2d 515.

Beyond these references, the opinion below does not lead inexorably to the conclusion that the syllabus regarding the homicide is based on federal law.

On the contrary, the dispositive paragraph of the opinion, (second from the end), is based directly on Ohio statutory law and interpretation. When the author of the opinion writes:

> It is manifestly obvious that these two states are mutually exclusive and that in any given killing the offender may be possessed of only one.

he is interpreting and applying state law. No decision of this Court commands, or even suggests, that two state homicide statutes are mutually exclusive from one another.[6]

When the Court below writes that 'where there is but one victim, the accused may be found guilty of either murder or involuntary manslaughter but certainly not both', *Johnson*, at 424, it is doing one of two things; either it is misstating federal constitutional law *(e.g. Missouri* v. *Hunter, supra)* or it is applying and enforcing the law of the state. If such statement follows a pronouncement that murder and manslaughter, under Ohio law, differ only by the mental state of the actor, it cannot be doubted that it is applying and enforcing *state* law.

While the opinion has gratuitous references to the federal Constitution and decisions of this Court, careful examination

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[6] Conceivably two homicide prosecutions in the same trial might implicate constitutional principles if a person were convicted of one and acquitted of the other. Cf. *Green* v. *United States*, 355 U.S. 184.

reveals that none is the basis for the decision. This conclusion is buttressed by the first syllabus, discussed above, which directly refers to the state statute. It would make no sense for the Ohio court to decide these two identical questions on different grounds and this Court should not assume that it did.[7]

Justice White in *Zacchini* v. *Scripps-Howard*, *supra*, restated the role of this Court on this issue:

> [O]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions.

Zacchini, at 566 quoting *Herb* v. *Pitcairn*, 324 U.S. 117, 125-6. *Michigan* v. *Long*, *supra*, did not enlarge the power of this Court over state judgments and its presumptions should not be applied mechanically to usurp state authority. The 'evil' that this jurisdictional limitation is designed to guard against is present in this case, to wit: advisory opinions.

D. Regardless of this Court's decision on federal law, the Ohio Court, on remand, would be free to adhere to its former judgment based on R.C. § 2941.25

If the robbery dismissal is held to be based on an independent state ground and the murder dismissal is held to be based on federal law, either sustantively or under *Michigan* v. *Long*, the writ must nevertheless be dismissed because the Ohio court on remand could still dismiss the murder count under R.C. § 2941.25 making this Court's decision advisory only.

Regardless of the uncertainty that may surround the Ohio court's disposition of the murder charge (the respondent does not concede that it is intolerably uncertain), its disposition of the robbery charge could not more squarely meet the requirements of *Michigan* v. *Long*, *supra*, as an assertion and explica-

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[7] The single indictment and the entry of the pleas were one event. (Jt. App. pp. 2-9). No analysis would allow them to be treated as different legal questions or invoke different protections.

tion of its state law foundation. For that reason at least *part* of the judgment rests on unreviewable state grounds.

Assuming, without conceding, that this Court can 'divide' the judgment of a state court for jurisdictional purposes, the writ must still be dismissed under the holdings of *Herb* v. *Pitcairn, supra,* and *Zacchini* v. *Scripps-Howard, supra,* because

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court *after we corrected its views of federal laws,* our review could amount to nothing more than an advisory opinion. (Emphasis added.)

Herb v. *Pitcairn, supra,* at 125-6.

There is language in the opinion below that must be taken as improperly applying federal law.[8] It seems clear that whatever is the final resolution of this case, the multiple punishment prong of *North Carolina* v. *Pearce,* 395 U.S. 711, is not implicated. (Brief of the United States, p. 11.)

That apparent misstatement in the opinion, as opposed to the syllabus, cf. *Perkins* v. *Benguet Consolidated Mining Co., supra,* must be viewed with the understanding that "This Court . . . reviews judgments, not statements in opinions." *FCC* v. *Pacifica Foundation,* 438 U.S. 726 at 734, quoting *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297.

If this Court "corrected" the state court's view of federal law by saying either that there is no application of the Double Jeopardy Clause in this case, or, that it is the second prong of *Pearce, supra,* (protecting against a second prosecution after conviction) that applies, the Ohio Supreme Court would be free on remand to adhere to its former *judgment,* as opposed to opinion, on the basis of Revised Code Section 2941.25, the multiple count statute.

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[8] "Rather, the case concerns the third double jeopardy protection prohibiting multiple punishments for the same offense." *State* v. *Johnson,* 6 Ohio St. 3d 420 at 421.

That would be the case in one of two ways: Either the Ohio court could say that it had decided this portion of the case on the statute originally despite language conceivably making that unclear, or, it could say that 'the decision of the Supreme Court of the United States regarding our earlier application of the Double Jeopardy Clause notwithstanding, we now conclude that the murder charge was properly dismissed because Mr. Johnson has previously been convicted of manslaughter which is an "allied offense of similar import," (R.C. § 2941.25 applied.)'

Such an option remaining in the Court below presents a very significant risk that any decision of this Court will be advisory only and will not finally adjudicate a "case or controversy."

II. The Double Jeopardy Clause Of The United States Constitution Prohibits Trial Of The Respondent On The Charges Of Murder And Aggravated Robbery

Kenneth Johnson has been convicted of killing Thomas Hill and of stealing his property.

He is presently three and one-half years into the sentence of imprisonment at the Chillicothe Correctional Facility, that the petitioner has imposed upon him for his conduct. He is there today.

The petitioner proposes taking Mr. Johnson from Chillicothe to Lake County and putting him on trial for killing Thomas Hill and stealing his property.

The above recitation is certainly not made flippantly or disrespectfully but only to attempt to bring some simplicity to the question presented by this case. Few of the cases in this Court's burgeoning double jeopardy jurisprudence have had less complicated facts and more straightforward choices.

Having been convicted of the crimes described, the unaltered historical protections of the Double Jeopardy Clause would surely be thought to protect him from being prosecuted for them again unless, for some reason, the planned prosecu-

tion is not for the "same offense" or it is not viewed as placing him "twice" in jeopardy. It is manifestly clear that the two dismissed charges are the "same offense" and a trial now would again put the respondent in jeopardy of losing his liberty for a greater period of time for the same offenses for which he has been convicted.

A. Murder and involuntary manslaughter are the "same offense" for double jeopardy purposes.

Since, the constitutional language itself includes "same offense," the determination of whether two state crimes are the same offense is, in the final analysis, a question of federal constitutional law for this Court. At the same time, this Court has declared that a greater and lesser included offense under state law will invariably be the "same offense" for purposes of the Fifth Amendment. "The greater offense is therefore the "same" for purposes of double jeopardy as any lesser offense included in it." *Brown* v. *Ohio*, 432 U.S. 161 at 168.

The state courts, being the final arbiters of their own state's legislation, *Garner* v. *Louisiana*, 368 U.S. 157, 169, will typically be the place to look for (1) the general test in that state regarding lesser included offenses and (2) whether the two crimes in question have been determined by the state court to bear that relationship to one another.

Because of *Brown*, if the state has made that determination it has also circumscribed this Court's authority to conclude that the two offenses are *not* the same for double jeopardy purposes.

In this case the Ohio Supreme Court has specifically held that involuntary manslaughter is a lesser included offense of murder because it has determined in the syllabus that the two share the common element of 'causing the death of another' and are 'distinguishable only by the offender's mental state.' The Court also points out at the end of the opinion: "Involuntary

manslaughter involves a *lesser* mental state . . ." (Emphasis added, *Johnson* at 424).[9]

This Court observed in *Illinois* v. *Vitale*, 447 U.S. 410, (a case with more than a few similarities to this case):

> We accept, as we must, the Supreme Court of Illinois' identification of the elements of the offenses involved here.

Id., at 416. Applying that maxim to the opinion (and syllabus) below, the conclusion is unavoidable that the only different element in these two crimes is the mental state of the offender and that whatever the mental state required by the felony or misdemeanor that is the predicate for the manslaughter, it will be included in the "purposely" required to prove murder, the greater offense.[10]

In addition to specifically identifying manslaughter as a lesser included offense of murder (see, also, *State* v. *Scott*, 61 Ohio St. 2d 155), the generally announced guidelines for what constitutes a lesser included offense are satisfied here.

In *State* v. *Wilkins*, 64 Ohio St. 2d 382, the Ohio Supreme Court held that one offense is a lesser included of another if all three of the following tests were met:

(1) One offense must be lesser in degree than the other,

(2) The offense of the greater degree cannot be committed without the lesser offense also being committed, and

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[9] Ohio Revised Code Section 2901.22(E) makes it clear that any particular culpable mental state, *e.g.* purposely, also includes any and all the lesser culpable mental states, *e.g.* knowingly, recklessly, negligently, etc.

[10] The Ohio court makes this determination regardless of whether the underlying crime is identified or not. The petitioner's argument that some misdemeanors, like discharging firearms in the city, may require no mental state (Brief of Petitioner, pp. 34-38), misses the point. Firstly, it would be impossible to intentionally shoot someone in Mentor-on-the-Lake without being guilty of discharging a firearm in the City. Secondly, the Ohio Supreme Court's determination regarding the relationship between these statutes is conclusive and is not a part of this appeal.

(3) Some element of the greater is not required to prove the commission of the lesser.

Applying these tests here, murder is surely a 'higher' crime; one cannot commit murder without committing a host of lesser offenses, (felonious assault, assault, menacing, or discharging a firearm in the city); and, obviously, none of the lesser offenses will include the element of purpose to kill as does murder.

The Ohio Supreme Court did not hold that murder subsumes every misdemeanor on the book; it did hold that murder subsumes every misdemeanor capable of being the proximate cause of someone's death. Ergo, "the offenses of murder, R.C. § 2903.02, and involuntary manslaughter, R.C. § 2903.04, share the common element of causing the death of another and are distinguishable *only* by the offender's mental state." *State* v. *Johnson*, 6 Ohio St. 3d 420, syllabus two. (Emphasis added.)

The Ohio determination of what is required to prove each of these crimes establishes that manslaughter is a lesser offense and, therefore, the application of the constitutional rule of *Brown*, *supra*, regarding what constitutes the same offense, is controlling.

While greater and lesser included offenses are the "same" under the Fifth Amendment, and that is enough to decide this case, that test alone is not the final outline of the Fifth Amendment protection. Greater and lesser included offenses implicate the ever-present Blockburger Rule, *Blockburger* v. *United States*, 284 U.S. 299 and multiple-part crimes implicate *In Re Nielsen*, 131 U.S. 176 and its progeny.

The Blockburger Rule (which does not need repeating) by now is thoroughly understood to be a rule of federal statutory construction, *Whalen* v. *United States*, 445 U.S. 684, applicable in the first instance to the third prong of the test contained in *North Carolina* v. *Pearce*, 395 U.S. 711, 717, to determine, in the face of congressional ambiguity, whether successive punishments are authorized for two separate convictions.

While that was the original purpose of the Rule, it has since done tremendous service as the *initial* test to determine if two

crimes are the "same offense." In this role, *Blockburger* has not specifically been held to be a constitutional test for determining whether two crimes are the same, but its widespread use for that purpose in both federal and state cases confirms that its utility is not different from a constitutional test. *Missouri* v. *Hunter*, *supra*, (dissenting opinion).

It was the application of *Blockburger* to greater and lesser included offenses in *Brown* v. *Ohio*, *supra*, that resulted in the holding of that case (quoted above) that they would invariably be the "same offense" for double jeopardy purposes.

But it is true that *Blockburger* focuses on elements of crimes and the evidence that is required to prove them. In cases where the original purpose of the rule, (determining if cumulative punishment is allowed) is being utilized, it is very effective and sensible.

Thus, where the question is whether there are two offenses or only one, there will already have been two charges and two convictions and the court can then examine the two charges to determine if each required proof of a fact that the other did not. *Albernaz* v. *United States*, 450 U.S. 333, *Gore* v. *United Staes*, 357 U.S. 386.

The use of *Blockburger* for other portions of the *Pearce* test is more difficult and in some cases, like this one, is impossible. In this case and in *Illinois* v. *Vitale*, *supra*, it was never known what the full charge would be, at least in terms of the elements of the crimes.[11] In *Vitale*, the prosecution consistently maintained that 'failure to slow' was not the only act of the juvenile that could establish the traffic manslaughter, but never identified what act it was that it intended to rely on.

Here, as noted in fn 11, the prosecutor has likewise not identified the misdemeanor involved and almost suggests that he does not know himself.[12]

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[11] Petitioner admits in this Court that "It has never been established which underlying misdemeanor was the cause of death." Brief of Petitioner, p. 34.

[12] Perhaps one of the grand jurors will remember.

In these situations this Court has recognized that the same-required-evidence test of *Blockburger* is ineffective and an examination of *actual* evidence to be used at the second trial is required. *Vitale, supra*, at 419, 420. Also, *United States* v. *Allen*, 539 F. Supp. 296, 310, (C.D. California).

The "actual" evidence test of *Vitale*, as opposed to the "required" evidence test of *Blockburger* was described as follows:

> In any event, it may be that to sustain its manslaughter case the state may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such a failure; it may concede as much prior to trial. In that case because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under Brown and our later decision in Harris v. Oklahoma, 433 U.S. 682.

Id., at 420.

This "actual" evidence test is a restatement of *Nielsen*, *supra*, and has been regularly reaffirmed.

Mr. Johnson has 'already been convicted for conduct that is a necessary element' of the more serious charge, to wit: causing the death of Thomas Hill. And, 'the State may find it necessary to prove manslaughter or rely on conduct, i.e. shooting the gun, necessarily involving manslaughter.' For these reasons murder and manslaughter are the same offense for purposes of the Double Jeopardy Clause.

The "same offense" will never be the exact same offense because no prosecutor after he had tried and convicted a person of one whole indictment would begin the prosecution again.[13] Likewise no prosecutor would be able to ignore an

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[13] Actually something close to that could happen here. Under *State* v. *Scott*, *supra*, Johnson would be entitled to jury instructions on misdemeanor manslaughter if he went to trial. He could in that event be convicted of precisely the same offense which would surely violate the Fifth Amendment. Of course it would be too late for him to do anything about it. The position of the United States on this question is seriously wide of the mark. Brief of

acquittal and re-indict the defendant again for the same crime. (While it may have happened, it would have been short-lived.)

The "same offense" questions will always involve slightly different crimes and will arise uniformly where the prosecutor has lost a case and wants to recoup the loss or when he has gotten some conviction but is dissatisfied with the punishment.

The Double Jeopardy Clause must not be narrowly applied on the understanding of what is the same offense.

Accordingly, the proposed prosecution of Kenneth Johnson for murder will be for the "same offense" for which he has already been in jeopardy.[14]

B. The collateral estoppel ingredient of the Double Jeopardy Clause prohibits further prosecution of the respondent.

Ashe v. *Swenson*, 397 U.S. 436, determined that the ancient legal doctrine of collateral estoppel was an integral part of ". . . the Fifth Amendment guarantee against double jeopardy." *Ashe*, at 445. Justice Stewart, writing for himself and six other Members of the Court, defined it as follows:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id., at 443.

United States, pp. 21-22. What the amicus does not answer is why the respondent should withdraw his plea(s) in order for the State to avoid the double jeopardy problems that will remain in this case if there is a trial. *Jeffers* v. *United States*, 432 U.S. 137, 151 n.17. *Illinois* v. *Vitale*, *supra*, at 420.

[14] In the first two "Questions Presented" the petitioner makes references to the whole indictment which includes the aggravated robbery and theft. No special reference is made to these charges in the argument and it appears to be conceded that they are the "same offense".

The practical tests of *Ashe* are: (1) a determination (one way or the other) of an ultimate fact in dispute, (2) a final judgment reflecting it, and, (3) an identity of parties. The Court also noted that the applicability of tests to a particular case was "a matter of constitutional fact [it] must decide through an examination of the entire record." *Id.* 442-3.

The application of these tests do this case is straightforward. There is an extant judgment, unappealed by anyone, between the State of Ohio and Kenneth Johnson convicting and sentencing him for the involuntary manslaughter of Thomas Hill and the theft of his property. Jt. App., p. 20.

With regard to the involuntary manslaughter that judgment constitutes a final, legal determination of the ultimate fact in this controversy, the causing of Mr. Hill's death. That judgment says: 'Kenneth Johnson caused the death of Thomas Hill as a proximate result of the said Kenneth M. Johnson's committing or attempting to commit a misdemeanor.' Jt. App., p. 2, Count Two of the indictment.

Since the murder count alleges that the respondent "purposely" caused the death of Thomas Hill, it is obvious that the 'ultimate' question between them is: How was the death caused? It is just as obvious now that the ultimate fact has been "determined" and that determination is that the death was caused as a proximate result of Mr. Johnson committing a misdemeanor.

In *Ashe* the only conceivable question from an examination of the entire record was whether Ashe was one of the robbers. Here, just as in *Ashe*, the only conceivable question was the manner in which the death was caused.

Since the inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings," *Sealfon* v. *United States*, 332 U.S. 575, 579, it can make no constitutional difference that this judgment was the result of a guilty plea rather than a verdict. In fact when the judgment follows a guilty plea, questions about what the jury may

have based their verdict on are eliminated together with the attendant risk of error.

Likewise there is nothing at all in the history of collateral estoppel to suggest that it *only* applies to acquittals. The very language of Justice Stewart in *Ashe* refers only to judgments without any hint that it is meant to apply only to judgments of acquittal.

And while the principle of collateral estoppel has only recently (1970) been incorporated into the Fifth Amendment, it was fully contemplated by Blackstone as an adjunct to the plea autrefoits convict. He noted in *Book IV* of *Commentaries*, at pp. 335-6:[15]

> And this depends upon the same principle as the former [autrefoits acquit], that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held that a conviction of manslaughter on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder; *for the fact prosecuted is the same in both*, thought the offences differ in coloring and in degree. (Emphasis supplied.)

This Court, in *Brown* v. *Ohio*, supra, fn 6, specifically left open the question of whether Brown would be entitled to the "additional protection of Ashe and Nielsen" to protect him against repetition of proof in successive prosecutions. Since Brown pleaded guilty to both charges in his case, it can hardly be claimed that *Ashe* is somehow limited to acquittals. Cf. *Illinois* v. *Vitale*, 447 U.S. at 420.

The other crucial consideration of *Ashe* is the prohibition against relitigating an ultimate fact in a "future" lawsuit. Is the reproving of ultimate facts following a guilty plea and judgment a "future" lawsuit when the four charges initially appeared in one indictment? The answer is an emphatic "yes."

The history of collateral estoppel in civil law and its philosophical foundation indicate strongly that its major goal is the

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[15] Lewis's Edition

attainment of finality in judgments and the settlement of disputes. Without such a doctrine in civil law every litigant failing to prevail in, say, a negligence case could continue to seek hearings striving for more desirable results.

The Double Jeopardy Clause, on the other hand, while not unconcerned with finality, *Crist* v. *Bretz*, 437 U.S. 28, 33, has as its foundation protection against government oppression.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . .

Green v. *United States*, 355 U.S. 184, 187-8.

Since the judgment against the respondent remains, it can make no difference that the proposed prosecution originates in the same indictment. It was the state that had full control over the indictment and the respondent's plea of guilty at his very first opportunity, under Ohio Rules that fully authorized him to do so, cannot be held to deprive him of the protection of the Fifth Amendment.

If a better rule would be that the government's objection to the plea is sufficient to prevent its acceptance, that is a matter for the Ohio General Assembly and the Ohio Supreme Court; it is manifestly not an acceptable reason to alter the protections of the Double Jeopardy Clause.

There is nothing in the phrase 'future lawsuit' that limits its application to a proceeding started later with a separate document, be it a civil complaint or a new indictment. It is undisputed that respondent could not have been charged in a second indictment with murder and aggravated robbery following his conviction for manslaughter and theft in an earlier indictment. *Brown* v. *Ohio*, *supra*. His protection against having the same facts litigated twice cannot be so fragile that it will apply if the indictments are separate and it will not apply if there is only

one. To allow reproving these facts now because it is not a "future" lawsuit would be defining the protection of *Ashe* in a "hypertechnical and archaic approach of a 19th century pleading book." *Ashe* at 444.

C. A trial now on murder and aggravated robbery would put the respondent "twice" in jeopardy

A person serving a prison sentence for an offense cannot reasonably be said to not have been "in jeopardy of life or limb." As the Solicitor General rightly points out (Brief of United States at p. 12), this Court has never specifically considered the question of whether a guilty plea is the same as a jury verdict as a vehicle for establishing jeopardy, at least as a predicate for a claim that a future proposed prosecution would be double jeopardy.

Of course jeopardy can never be limited to risk of another trial; it can only mean exposure to the government's power to impose a sanction. It would seem to divert attention from the real question to argue that proper application of the Fifth Amendment will be somehow frustrated in a case such a this where there will be *no* trials.

On the basis of *In Re Hans Nielsen*, 131 U.S. 176, this Court held in *North Carolina* v. *Pearce*, 395 U.S. 711 at 717 that the Double Jeopardy Clause protects against a "second prosecution for the same offense after conviction[.]." But that phrase cannot be read as prohibiting only a 'second, independently originated prosecution'. Indeed all parties here concede that had Mr. Johnson been indicted for manslaughter and theft and pleaded guilty, he could not have then been indicted and tried for murder and aggravated robbery without violating the Fifth Amendment.

If the above language were to mean that it is only a second, new prosecution that is prohibited then the Double Jeopardy Clause would be effectively a grant of authority for the government and not the repository of protections *from* the government that it was designed to be. It would give "conviction" an

artificial and mythical meaning and would be license for prosecutors to avoid the commands of *Pearce*, *supra*.

Since jeopardy has attached, future proceedings must violate the constitutional protection unless it can somehow be said that they are a "continuation" of the original proceeding (which was 3½ years ago).

Cases, relied on heavily by the petitioner and the United States, which delineated exceptions to the rule against a second proceeding are significantly different than this case and do not compel the result sought.

In *United States* v. *Scott*, 437 U.S. 82, this Court held that a government appeal from a motion that dismissed the indictment for a speedy trial violation was authorized by statute because a re-trial was not barred by the Fifth Amendment. This was held to be so even though the trial court had not dismissed the indictment until the end of the first jury trial.

Despite the fact that Scott had been in "jeopardy" at the first trial, a second trial (if the government won the appeal) was permissible because the dismissal was unrelated to guilt or innocence and was as the result of the defendant's own motion. From these facts the Court concluded that the Fifth Amendment "does not relieve a defendant from the consequences of his voluntary choice." *Scott*, at 99.

Reliance on that quotation to make an analogy to Johnson's plea of guilty overlooks a significant condition that is an integral part of the *Scott* opinion.

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis *unrelated to factual guilt or innocence* of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause . . . (Emphasis added.)

Ibid.

Johnson, unlike Scott, sought termination *because of*, and *after*, a determination of his guilt. This Court's concern in *Scott*

regarding the extension of the right against double jeopardy draws a very important line between guilt-not-guilt determinations and exposure to the rigors of trial that do reach that result.

Scott, while it eschews waiver as a rationale, stands simply for the rule that a defendant who seeks and obtains a mid-trial dismissal, other than on guilt or non-guilt, risks the possibility that the ruling will be reversed on appeal. *Scott*, at 100 n.13. Johnson's situation is significantly different; the determination of his guilt by the valid guilty plea ended the controversy. Perhaps more importantly, Johnson filed no motion or took any action to forstall a judicial inquiry into the events of January 25, 1979. His fully authorized plea of guilty cannot be equated with a motion to terminate the proceedings.

The fact that this Court authorized what in fact, if not in law, was a two step process in the Maryland Juvenile Court system further identified the core interests that the Double Jeopardy Clause guards. *Swisher* v. *Brady*, 438 U.S. 204.

In *Swisher, supra*, the fact that evidence might be repeated in the *de novo* hearing before the juvenile judge was held not to activate the protection for the basic reason that the original hearing was before a master (referee) who was wholly without jurisdiction to enter a final judgment. *Swisher*, at 208-9.

Hence, the possibility in Maryland that some juveniles may have to "endure" a second hearing at which evidence is adduced,[16] was acceptable because at the first hearing the officer was not capable of entering judgment.

While the defendants in *Scott* and *Swisher* might have endured the evidence twice, in neither was the risk of conviction extant or oppressively manipulated. In *Scott* the risk of conviction was clearly present until the defendant was able to termi-

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[16] Under the Maryland law discussed in *Swisher*, the juvenile himself would have to agree to the judge hearing new evidence.

nate it on an issue unrelated to his guilt or innocence. In *Swisher*, it simply was not present during the taking-of-evidence stage of the proceeding.

On the other hand, this Court has unanimously held that a two-step process that includes the risk of conviction at each level is prohibited by the Double Jeopardy Clause. Thus, in *Breed* v. *Jones*, 421 U.S. 514, the California Juvenile Code provided that in the case of certain offenders the juvenile court could, following the adjudicatory stage, find the juvenile not amenable to treatment as a juvenile and transfer the case to the adult court.

After hearing testimony on the facts, including from the juvenile, the juvenile court found that the facts alleged were true.[17] That hearing constituted an adjudication on the merits. Pursuant to California law the case was transferred to adult court and the juvenile was again convicted of the crime and placed in custody.

Not only did this Court find that such a system offended the policies of the Fifth Amendment by subjecting the defendant to two trials for the same offense, *Breed*, at 534, it rejected the argument that somehow this two-stage trial could be justified as a "continuing" jeopardy.

The difference with *Swisher*, *supra*, is plain: even though there were two evidence-taking hearings, which would be burdensome, in *Breed*, supra, the juvenile judge had complete statutory authority to find the juvenile guilty.

One argument of the State in *Breed*, *supra*, was that the jeopardy should be properly viewed as continuing so as to fully encompass the "dispute" between the State and the juvenile. The State attempted to analogize its argument to the sometimes expressed rationale applied to a re-trial following an appellate reversal.

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[17] The crime charged was robbery.

The court found no justification in such an analysis and rejected it.

> Similarly, the fact that the proceedings against respondent had not "run their full course" *Price* v. *Georgia*, *supra*, at 326, within the contemplation of the California Welfare and Institutions Code, at the time of the transfer, does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial.

Breed, *supra*, at 534.

The instant case is even more within that concept because there are no state proceedings that have not run their course. Far from the statutory transfer procedure that was in effect in California, here we have only the interest of a prosecutor to go to trial. If the statutory interest was insufficient in *Breed*, to avoid the Fifth Amendment, it would follow that this prosecutor's interest must be likewise.

Of course, this case is even more poignant than *Breed*, *supra*, since there is fully executed judgment on the first proceeding. The respondent's interest in the finality of that conviction is great and no interest of the State surpasses it.

This Court has frequently written that the "exaltation of form over substance is to be avoided." *United States* v. *Di Francesco*, 449 U.S. 117, 142. While the "form" of this indictment might make it one proceeding, the unalterable "substantive" fact remains, as far as Kenneth Johnson is concerned, that a trial now on murder and robbery charges is a *second* proceeding.

The admonition against technical and begrudging application of the protection afforded by the Double Jeopardy Clause is well heeded when considering *Jeffers* v. *United States*, 432 U.S. 137, a case relied on extensively by the petitioner.

The reliance placed on *Jeffers* by both the petitioner and amicus is misplaced for technical as well as substantive reasons. *Jeffers* is not controlling because it is a plurality

opinion and the concurrence is based on wholly different grounds that do not implicate the Fifth Amendment at all.

Jeffers' inapplicability to this case on substantive grounds (as opposed to technical) is demonstrated by at least two major differences in the procedure that was followed.

Jeffers was indicted in two separate indictments for drug offenses. One of the offenses was arguably a lesser included offense of the other. The government sought to have the indictments tried together and the defendants opposed the motion which was ultimately denied by the District Court.

Jeffers joined in the opposition to the motion for trial together but took no other action to seek a separate trial. He was convicted of the lesser offense at the first trial and then filed a motion to dismiss the remaining indictment on double jeopardy grounds.[18]

In *Johnson*, the manslaughter and theft counts are lesser included offenses of the murder and aggravated robbery counts, respectively. That fact was discernible from the face of the indictment. On the other hand, in *Jeffers*, even after the decision, it has not been definitively concluded that §§ 846 and 848 bore that relationship to each other. *Jeffers*, at 149-150.

Because of that arguable difference between the federal statutes, the need for two indictments is at least plausible. Where the counts in this case are unquestionably lesser included offenses, the State had no need to indict them separately.[19]

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[18] This is obviously a highly shortened version of what transpired.

[19] The State apparently indicted for the lesser offenses in anticipation of Johnson claiming self-defense. Jt. App. p. 11. Under the State's theory Johnson's claim of self-defense would have prevented *it* from seeking jury instructions on the lesser included offenses, to wit: manslaughter and theft. What the State's theory does not explain is how Johnson's 'self-defense' could entitle him to a not-guilty verdict on the murder (which is a condition precedent to the jury's ever considering the manslaughter charge in Count Two), but not entitle him to a not-guilty verdict on the whole event. If his

A second difference that makes the *Jeffers* plurality opinion inapposite is the fact that Jeffers chose to go to trial and then opposed a trial together with the other indictment.

Johnson pleaded guilty and never attempted to bifurcate two cases in which the issues were joined and trials pending. The necessity for a trial never arises in any case until a defendant has denied the indictment. From this simple observation it is logically indisputable that a plea of guilty cannot be treated as a vehicle for obtaining separate trials.

Jeffers' double jeopardy challenge was rejected in the plurality opinion with some emphasis on his (1) failure to alert the Court and prosecutor that a double jeopardy claim may be ripening if the two cases were not tried together and, (2) his overt oppositon to the motion for trial together was construed as his "election" to have separate trials.

The plurality saw Jeffers' "conduct" as an exception to the rule of *Brown* v. *Ohio*, *supra*.

> If the defendant expressly asks for separate trials on the greater and lesser offenses, or, in connection with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other, another exception to the Brown rule emerges.

Jeffers, at 152 (plurality opinion.)

However, this rationale cannot apply to Johnson and even the plurality in *Jeffers* seemed to say as much. In footnote 15 of *Jeffers*' plurality opinion (at 150), Justice Blackmun wrote that

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'self-defense' was not persuasive, Johnson would have been convicted of murder; if it was persuasive, he would have been acquitted of both. Likewise, the State's reason for indicting for the lesser offenses makes no sense with regard to the aggravated robbery and theft. It would take great imagination to suggest that an aggravated robbery was committed in self-defense.

the exception fashioned for application to Jeffers' fact setting might well not apply in others.

> . . . Unless it is plain that two offenses are "the same" for double jeopardy purposes, the parties and the court should be entitled to assume that successive prosecutions are an available option. This assumption would only be reinforced if the defendant affirmatively asked the court to require two proceedings, and in connection with his request he actively sought postponement of his second trial, as Jeffers did.
>
> . . ., he was simply under an obligation to preserve his double jeopardy point properly, by alerting both court and prosecution to the existence of a complex, unsettled issue.

Id., at 150, n 15.

Plainly whatever uncertainty may have existed between the federal statutes at issue in that case, there was none in this case. As the transcript of the hearing of November 26, 1980 makes clear (Jt. App. pp. 10-11), the State assumed that manslaughter and theft were lesser included offenses. And, as noted earlier, the indictment was not drawn in the fashion that it was because of any apprehension on the State's part that these two offenses were not the "same" for double jeopardy purposes. (fn 19, *supra*, Jt. App. p. 11.)

With regard to the duty of the defendant to "alert" the court and the prosecution to the presence or possibility of the double jeopardy issue, the transcript of the original arraignment makes it crystal clear that everyone in the courtroom was aware within the first five minutes what position the defendant intended to take. (Jt. App. pp. 4-7.) More importantly, no action on the offered plea of guilty was taken at that hearing and the judge indicated he would consider whatever law the parties might present. (Jt. App. pp. 9-10.)

When the arraignment is on October 9, 1980, and the pleas are not finally accepted until November 26, 1980, it cannot be seriously maintained that the defendant 'lay-in-wait' for the prosecutor and then sprung the trap. The prosecutor could

have eliminated all the problems that did, or could, arise by simply dismissing the manslaughter and theft counts either at the arraignment or in the six weeks that intervened between the two court proceedings. The 'exception' to the rule of *Brown* v. *Ohio*, *supra*, cannot be applied to these facts.

The great service rendered by the Double Jeopardy Clause for 193 years compels the conclusion that its protection applies to Kenneth Johnson.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted, the decision below resting on adequate, independent state grounds.

In the event that jurisdiction is found to rest here, the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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